

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

<b>VIRDA BELL BULLARD; et. al.</b>	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	Case No. 07-C-6883
<b>BURLINGTON NORTHERN SANTA</b>	)	
<b>FE RAILWAY COMPANY; KOPPERS</b>	)	Judge Kennelly
<b>INDUSTRIES, INC.; MONSANTO</b>	)	Magistrate Judge Ashman
<b>COMPANY; DOW CHEMICAL</b>	)	
<b>COMPANY; AND VULCAN</b>	)	
<b>MATERIALS COMPANY</b>	)	
	)	
Defendants.	)	
	)	

**DEFENDANTS' NOTICE OF SUBSEQUENT AUTHORITY**

Defendants, BNSF RAILWAY COMPANY ("BNSF"),<sup>1</sup> KOPPERS INC. ("Koppers"),<sup>2</sup> MONSANTO COMPANY ("Monsanto"),<sup>3</sup> THE DOW CHEMICAL COMPANY ("Dow"),<sup>4</sup> and VULCAN MATERIALS COMPANY ("Vulcan") (hereinafter sometimes collectively referred to as "the Defendants"), submit this notice of subsequent authority to apprise the Court of the recent ruling by the United States District Court for the Western District of Texas in *Brinston v. Koppers Industries, Inc.*, No. 07-902 (W.D. Tex. Jan. 31, 2008). The court's opinion in Brinston supports Defendants' argument that Plaintiffs cannot evade this Court's removal jurisdiction

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<sup>1</sup> BNSF is incorrectly identified as "Burlington Northern Santa Fe Railway Company" in Plaintiffs' Complaint.

<sup>2</sup> Koppers is incorrectly identified as "Koppers Industries, Inc." in Plaintiffs' Complaint.

<sup>3</sup> The subject matter of this lawsuit relates to time periods before Monsanto was incorporated, and to products that were never manufactured, sold, and/or distributed by Monsanto. Monsanto was incorporated on February 9, 2000. The subject matter of this lawsuit relates to the alleged actions, and former business, of Pharmacia Corporation, f/k/a Monsanto Company.

<sup>4</sup> Dow is incorrectly identified as "Dow Chemical Company" in Plaintiffs' Complaint.

through a post-removal "stipulation" or voluntary dismissal. (A copy of the Brinston opinion is attached as Exhibit A).

In their Motion to Remand and Motion for Voluntary Dismissal, Plaintiffs attempt two post-removal maneuvers in an effort to defeat this court's removal jurisdiction under "mass action" provision of the Class Action Fairness Act ("CAFA"). First, Plaintiffs claim they will "stipulate" to separate trials and that they will not seek joint trials of more than 99 plaintiffs. *See* Motion to Remand at 4-5. Second, Plaintiffs seek the dismissal of enough plaintiffs to drop the case below the 100-plaintiff requirement for a "mass action." *See* Motion for Voluntary Dismissal at ¶ 5; Motion to Remand at 10.

In their Combined Response to Plaintiffs' Motion to Remand and Motion for Voluntary Dismissal, Defendants argue that because jurisdiction is determined based on the allegations in the complaint at the time of removal, Plaintiffs' post-removal "stipulation" or dismissals cannot defeat this Court's jurisdiction under CAFA. *See* Defendants' Combined Response at 8-12; *see also St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290 (1938); *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992). The Brinston opinion supports Defendants' argument.

In Brinston, the plaintiffs brought a putative class action and claimed that purported toxic chemicals used at the same Somerville plant involved in the present case<sup>5</sup> allegedly injured and contaminated their homes and property and the homes and property of the putative class. *See* Ex. A at 2. The plaintiffs filed their lawsuit in the District Court of Burleson County, Texas, and the defendants removed the case to the Western District of Texas pursuant to CAFA. *Id.* The plaintiffs then filed a motion for leave to amend their complaint to withdraw their class allegations in an attempt to destroy the court's CAFA jurisdiction. *Id.* at 2-33.

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<sup>5</sup> As explained in Defendants' Notice of Removal, three of the plaintiffs' attorneys in Brinston – Grover G. Hankins, Dwight E. Jefferson, and James L. "Larry" Wright – also represent Plaintiffs in this case, and the two defendants in Brinston – BNSF and Koppers – are also defendants in this case.

The court granted the plaintiffs leave to amend their complaint to remove the class allegations but ruled that the amendment did not divest the court of jurisdiction under CAFA. *Id.* at 5. Noting that the "basis for federal jurisdiction under CAFA is established at the time of removal" and that "subsequent events generally cannot 'oust' the federal court of jurisdiction," and relying on two of the cases – *Garcia v. Boyar & Miller, P.C.* and *Braud v. Transportation Services Co.* – Defendants cited in their Combined Response, the court held that plaintiffs' amendment would not result in remand. *Id.*; *see also* Defendants' Combined Response at 9, 11.

The Brinston ruling confirms that CAFA removal jurisdiction is determined at the time of removal and cannot be defeated by subsequent amendments, "stipulations," or dismissals. *Id.* Accordingly, Plaintiffs' Motion to Remand and Motion for Voluntary Dismissal in the present action should be denied.

Dated: February 1, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Robert L. Shuftan, an attorney, state that I have served true and correct copies of the foregoing *Defendants' Notice of Subsequent Authority* upon the below attorneys via overnight mail on February 1, 2008 and upon all other attorneys of record through the Court's CM/ECF system:

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